

404 Issues Meeting

A meeting was held April 12, 2010, 1:00 CST, at the U.S. Army Corps of Engineers Newburgh office to discuss issues surrounding Section 404 permit applications.

Attendees: USACE- Jim Townsend, George Delancey, Sam Werner, Michael Ricketts. IDEM- Kristin Brier (Facilitator), Martha Clark-Mettler, Dave Carr. IDNR- Bruce Stevens, David Phillips, Brock Mayes, Jayne Peltier (Note Taker), Ramona Briggeman. EPA- Peter Swenson, Wendy Melgin, Ken Westlake. OSM- Andy Gilmore. Industry- Karen Risner and Bill Gunn of United Minerals; Ray Judy of Foertsch Construction/Little Sandy Coal Company; Scott McGarvie and Bryce West of Peabody Energy; Michael Owen of Solar Sources; Jim Buck, Consultant; and Alex Messamore of Vigo Coal Company.

Agenda

1:00 Introductions and confirmation of goals.

1:15 Each agency (USACE, USEPA, USFWS, OSMRE, IDNR, and IDEM) takes 15 to 20 minutes (max) to discuss their roles, approach to mitigation, and types of monitoring and sampling they currently require or would like to see implemented and why.

2:30 to 2:40 Break

2:40 Response and recommendations from Industry

3:00 Revisit goals and adjust as needed. Discuss the best approach to development of a template

Jim Townsend opened the meeting indicating his appreciation to those in attendance. Mr. Townsend discussed the subject matter of the meeting was to become more knowledgeable of required monitoring and sampling on coal mining sites by each regulatory agency and to involve industry in an effort to develop a template/protocol that better defines what is needed to characterize the impact to and the mitigation of sites, the amount of mitigation necessary, and the type of monitoring and sampling to ensure successful mitigation of stream and wetlands. The goal is also to make the best use of currently required information, avoid redundancy, and improve transparency for coal mine permit applications. The ultimate outcome is the intention to develop a guide or protocol for prospective permit applicants. This is viewed as a worthwhile initiative to provide predictability and transparency for both applicants and reviewers.

A member of the U.S. Fish and Wildlife Service (FWS) could not be present at the meeting, but comments from Scott Pruett of the FWS were put forth by Jim Townsend. These included:

- During site characterization there is a need to have a standardized methodology for selecting the number of sample sites and scoring the

results, particularly for habitat assessment, and a component of stream/watershed size must be considered.

- Mitigation sites should include connectivity not only within the permit area but also to adjacent forested areas.
- Post-Reclamation stream monitoring needs both physical monitoring and bioassessments.

Each agency discussed their roles, desires, and issues of concern. The following are issues brought forth during the initial discussion:

USACE

- An overview of a typical application with characterization and monitoring locations was provided.
- It was mentioned while a look 30 years into the future is not currently possible, it is possible to look about 5 years out to see what type of biology is coming back.
- The approach to mitigation uses the Rosgen and EPA RBP system (RBP-rapid bioassessment protocol). These methods help to characterize the condition of streams and how they are functioning.
- The USACE looks at flow order while determining appropriate mitigation.
- The intent is to capture the physical characteristics and the habitat of the stream.
- The manner in which mitigation is determined is by focusing on functionality rather than simply relying on mitigation ratios.
- The USACE continues to look at mitigation areas to determine if replacement provides for stable streams and learning from the results of mitigation.

IDEM

- IDEM allows release of monitoring when the biological community is re-established and mitigation is successful.
- A desire for the IDEM 401 monitoring to be released concurrently with SMCRA bond release was mentioned.

EPA

- It was mentioned EPA has no direct responsibility in the 404 permitting decisions, but their agency has a responsibility for discretionary review and input.

- Topics in EPA review include minimization, avoidance, water quality, long-term protections, mitigation, monitoring, and financial assurance.
- EPA reviews and comments on other agencies finding.

NEPA

- Would like the opportunity to play a role in the commenting concerning habitat issues, water quality, environmental justice, and aquatic resources.

IDNR

- Concern in balancing post mine land uses such as prime farmland mandates, reforestation ratios, and landowner desires.
- IDNR discussed swell ratios and spoil placement which increases in height with increased floodplain widths.
- IDNR provided a brief overview of criteria necessary for attainment of bond release.

OSM

- OSM stated they were not certain what requirements will eventually be contained within the agency's stream protection rule as the EIS continues to evolve. It is expected a biologic component will be included.
- OSM mentioned they are very concerned about ensuring all post mine land use criteria be met.
- OSM encouraged early coordination from all agencies.
- OSM mentioned the Congressional mandate within their law to strike a balance between mining for energy production and protection of the public and environment.

Industry

- Industry asked for clarification on what criteria is utilized concerning environmental justice.
- It was mentioned they are hoping for more consistency and predictability throughout the process.
- Indicated a good outcome would be a one stop shop.
- The jurisdictional determination process works but determining which waters are jurisdictional is not always clear within the upper reaches.
- Industry would like to see consistency and predictability throughout permit reviews.
- It was mentioned jurisdictional waters continue to be at issue and possibly it is not known that is a major concern because, due to the

need for a permit, they typically accept these determinations rather than argue about them.

- Industry would like additional input on determining sampling and monitoring points.

A round table discussion ensued in which specific topics brought up during the previous discussions were responded to and additional information provided.

In regard to environmental justice, EPA's NEPA representative said the agency strives to make sure low income or a minority population has no adverse impacts from federal actions. Criteria include a host of human health and environmental issues that are considered. It was mentioned an Environmental Justice GIS tool is available on the EPA website and industry was encouraged to review it for a more comprehensive overview.

EPA stated there is a training module available concerning headwater stream jurisdictional determinations. EPA stated a willingness to provide that session at a future meeting.

USACE mentioned they recognize industry has no control over where the coal is located and that makes any form of alternatives analysis difficult. EPA's NEPA representative said it is understood the process is more complicated with coal mining but still encourages the feedback and there still may be opportunities to be considered such as placement of spoil piles and mitigation construction.

EPA mentioned the April 1, 2010 guidance will be reissued very soon. DNR asked if EPA had any detail as to modification of the April 1, 2010 guidance as its applicability was specifically to Appalachian region states although it did contain discussion as to being relevant in other regions. EPA discussed the intent was always to reissue the guidance upon receipt and consideration of comments from interested parties and that some 30,000 comment had been received. While it was not known specifically what changes have been made, it did take into account the recent review of the Science Advisory Board, will clarify certain aspects, and is expected to be released soon.

IDEM questioned the sequencing of permit applications. Industry responded that most of the time SMCRA and 404 applications are applied for at the same time with the SMCRA decision being rendered first.

Industry mentioned they would like the comment period to be specifically defined as a set time. They feel as though the practice of an agency providing comment during the initial comment period and responding to those comments and then additional comments being brought forth and being required to respond to those makes it difficult to receive a permit in a timely manner. The USACE stated it is necessary to address comments after the comment period has closed when they have deemed the comment to be substantive.

Industry mentioned the DNR and 404 comments occur separately for some agencies and they are oftentimes different comments. This leads to contradictions and difficulty complying with requirements.

Industry mentioned they would like specific guidance on ratios, open water requirements, off-site mitigation, banking issues, and would appreciate opportunity to input upon these issues and provide input in the development of a protocol for success standards.

EPA mentioned they are writing the same type comment letter time after time and would like all information initially rather than having to request it during the comment period. They indicated they sometimes have to request additional comment time in order to obtain the information necessary for their review.

Industry mentioned they would appreciate a prompt response to requests for discontinuation of monitoring. It was mentioned they submit a request for discontinuing monitoring but do not receive a reply which makes it difficult for them to know if the request has been accepted or if a determination was made that monitoring must continue. They mentioned it would be helpful if the release from monitoring requirements occur at the same time as release of SMCRA requirements.

Industry requested some form of allowance for modification to approved 404 permits be considered. It was mentioned there is an avenue in SMCRA to modify an approved permit or to add small areas to an approved permit without going through the lengthy permitting process and they would like to see this concept explored for 404 permits.

Kristin Brier, Facilitator, indicated a consistent message seemed to be the need for more information early in the process. DNR asked how these meetings take place and what the intended outcomes consist of. The USACE and EPA explained these would occur on a consistent basis and provide an opportunity for a prospective applicant to attend and provide an overview of their intended operation. The agencies then discuss issues of importance to be considered within the application with the intention of ensuring information is available sufficient for review at the time of submission. Specific items mentioned to be discussed at a coordination meeting included a mine plan map adequate to provide an understanding of the proposal, flow regimes, outstanding resource waters, water quality, and any endangered species concerns. It was stated the participation of all agencies is necessary to ensure success of coordination meetings. Industry mentioned there would be a great deal of information that would be necessary to be provided for these meetings and some of that information is sensitive concerning land acquisition.

The Facilitator asked if formation of a Work Group was a potential concept. Hearing no opposition, the USACE proposed a Work Group be initiated in an effort to put forth a template or protocol for use by prospective applicants. The priority topics are mitigation with monitoring and sampling requirements. Each agency is to nominate a technical person with industry providing two or three members to work toward a template or protocol for Section 404 applications. A primary and secondary representative to be members of the Workgroup is to be provided to Jim Townsend by April 19. The initial meeting is expected to be held by May 19 and a finished product anticipated in four to six months. It will be the responsibility of the representative(s) to keep their agency or industry informed as the process proceeds. The ultimate product is a template/protocol that has agency and industry support. The template/protocol is intended to provide for a comprehensive mitigation process from start to finish and improve review time by regulatory agencies and to provide adequate information for agency review.